Transnational Business and Human Rights Litigation: What about Enforcement?

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Providing access to remedy for victims of corporate human rights abuse and environmental harm is a complicated global issue requiring research in a wide range of research fields in and beyond law. My research aims to identify barriers to access to remedy posed by private international law rules on cross-border recognition and enforcement of judgments and to examine how they can be overcome. After setting the scene on business, human rights and access to remedy through transnational civil litigation against companies (A.), I will illustrate the problem of cross-border recognition and enforcement of judgments in such litigation (B.) and discuss the research methodology (C.).

A. Setting the scene: business, human rights and access to remedy

For decades, oil and gas company Shell carried out extraction activities in the Niger Delta in Nigeria. These activities were operated by several subsidiaries, including the Shell Petroleum Development Company of Nigeria (SPDC). Oil spills arising out of the extraction activities have caused severe water and air contamination, jeopardising the local population's right to land, health and a healthy environment. This has led to numerous proceedings before the Nigerian courts, many of them against SPDC. However, victims faced many hurdles in accessing justice in Nigeria. These hurdles included concerns regarding Nigeria's ability and willingness to provide effective remedy, as the country is a Joint Venture Partner of SPDC and the oil industry accounts for more than 90 percent of export earnings.[3] A number of victims therefore initiated proceedings before the courts of Shell's home states, including the successful Dutch case of *Four Nigerian Farmers and Milieudefensie v. Shell* and the ongoing case of *Okpabi v. Shell* in the UK.

The Shell Nigeria project and ensuing litigation is an example of the significant challenges victims of corporate human rights abuse often face when seeking remedy. Business activities often give rise to negative human rights and environmental impacts. Victims of such adverse impacts should have access to an effective remedy. This is recognised by the third pillar of the UN Guiding Principles on Business and Human Rights (UNGPs), which include a third pillar on access to remedy. Realising access to effective judicial remedies for victims of corporate human rights abuse has, however, proved to be a persisting challenge.[4] In today's global economy, transnational corporations' complex corporate structures and global value chains pose significant regulatory challenges and have often led to corporate impunity for adverse human rights and environmental impacts.

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[3] Axel Marx et al., 'Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries', Study for the European Parliament, 2019.

[4] Under the traditional state-centric approach to international law, only states have the obligation to ensure the respect and protection of human rights. As a result, victims of corporate adverse human rights and environmental impacts must seek remedy before domestic courts. Numerous sources have, however, identified the challenges that can arise during such proceedings before domestic courts, both in the state where the damage occurred as well as in transnational proceedings: *e.g.* Claire Bright and Benedict S. Wray, 'Corporations and Social Environmental Justice: The Role of Private International Law', European University Institute Law Working Paper 2012/02; Liesbeth Enneking, 'Judicial Remedies: The Issue of Applicable Law' in Juan José Álvarez Rubio and Katerina Yiannibas (eds.), *Human Rights in Business* (Routledge, 2017).

Transnational civil litigation, although only one possible strategy, plays an increasingly important role in attempts to hold companies accountable for such adverse impacts. In these cases, a civil lawsuit is brought in one state, often in the Global North, against a corporation for harm arising from adverse human rights or environmental impacts in another state, often in the Global South. Reliance on transnational private law mechanisms in the context of corporate human rights abuse activates the field of private international law, including rules on the cross-border recognition and enforcement of judgments.

B. The question of cross-border recognition and enforcement of judgments

The right to access to justice remains a dead letter if a judicial decision cannot be enforced in practice.[5] In cases with cross-border aspects, such as transnational civil litigation against companies, this enforcement will often be cross-border. On the one hand, difficulties can arise in the enforcement of foreign judgments awarding financial compensation, which can be demonstrated by the Lago Agrio litigation saga.[6] Cross-border enforcement of money judgments will be necessary, for example, when transnational corporate civil liability litigation includes foreign companies, be it foreign subsidiaries or suppliers or foreign parent companies.[7] In the Dutch *Four Nigerian Farmers* case against Shell, for example, the Court of Appeal of The Hague ordered only Shell's Nigerian subsidiary SPDC to compensate the claimants for the damage ensuing from the oil spillage.[8] In December 2022, however, a settlement was reached as to the financial compensation as reparation for the oil pollution. In general, the enforcement of money judgments against corporate defendants depends on the company's assets location. Especially against transnational corporations, who can furthermore move their assets over the course of proceedings, enforcement can be a true quest for assets and can lead to various jurisdictions. Because of the doctrine of separate legal personality, a judgment against one member of a corporate group will generally not be enforceable against other members of the group.[9]

On the other hand, the human rights aspect of these proceedings requires remedies that go beyond financial compensation.[10] The UNGPs recognise that access to an effective remedy consists of both procedural and substantive aspects, which corresponds to the procedural and substantive dimensions of the human right to an effective remedy. The substantive aspect of that right refers to the outcome

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[5] The right to access to justice is an internationally recognised human right, enshrined in various international and regional human rights instruments. *E.g.* Art. 8 of the Universal Declaration of Human Rights; Art. 2 of the International Covenant on Civil and Political Rights and Art. 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[6] The case concerned severe environmental damage caused by Texaco's oil operation activities in the Oriente region in Ecuador. The claimants obtained a multibillion-dollar judgment from an Ecuadorian court. Efforts to enforce this judgment against Texaco's successor Chevron have, however, continuingly failed in various countries, including Argentina, Brazil, Canada and the US. See Diego P. Fernández Arroyo, 'Adjudicating public interests by private means: the inescapable involvement of States in the Chevron/Ecuador saga' in Horatia Muir Watt, Lucia Bíziková, Agatha Brandão De Oliveira and Diego P. Fernández Arroyo (eds.), *Global Private International Law* (Edward Elgar Publishing, 2019).

[7] Example of the former: Shell's Nigerian subsidiary SPDC in the Dutch case of *Four Nigerian Farmers and Milieudefensie v. Shell*, *cf.* supra. Example of the latter: Brazilian petrochemicals company Braskem SA in the *Maceió victims v. Braskem* case.

[8] Gerechtshof Den Haag, 29 January 2021, ECLI:NL:GHDHA:2021:1825, Rechtspraak.nl.

[9] Sara L. Seck and Akinwumi Ogunranti, 'Accountability: Legal Risks and Remedies' in *Corporate Social Responsibility – Sustainable Business: Environmental, Social and Governance Frameworks for the 21st Century* (Kluwer Law International, 2020) 685-610.

[10] See Cees Van Dam, 'Breakthrough in Parent Company Liability: Three Shell Defeats, the End of an Era and New Paradigms' (2021) Eur. Co. Financ. Law Rev. 2021, 714; Liliana Lizarazo-Rodríguez, 'The UN "Guiding Principles on Business and Human Rights": Methodological Challenges to Assessing the Third Pillar: Access to Effective Remedy', (2018) 36:4 Nord. J. Hum. Rights, 353.

of the proceedings and thus to the relief afforded to the successful claimant.[11] According to the UNGPs, provided remedies may take a range of substantive forms, which refer to a range of substantive remedies, including apologies, financial or non-financial compensation and the prevention of harm through, for example, injunctions or guarantees of non-repetition (Commentary to Guiding Principle 25). In the Dutch case of *Four Nigerian Farmers and Milieudefensie v. Shell,* for example, the court ordered Shell to install a leak detection system on certain oil pipelines in Nigeria. In private international law, however, the cross-border recognition and enforcement of non-monetary judgments can constitute a challenge.[12]

Furthermore, prior to the stage of actual judgment enforcement, rules on cross-border recognition and enforcement will play a role in plaintiffs' litigation strategy. The choice of forum and of defendant companies will depend, among other things, on the enforceability of a potentially successful judgment, which can also constitute leverage in settlement negotiations.[13] The prospect of enforceability limits which cases are viable for transnational litigation. This relates to the question of the extent to which Global North country courts should have international jurisdiction to rule on negative human rights and environmental impacts in the Global South. In the EU, there have been proposals on the extension of the jurisdictional grounds in the EU Brussels I*a* Regulation to foreign, non-EU defendants.[14] Others have, on the other hand, questioned the need for such an amendment.[15] From an access to remedy viewpoint, the cross-border recognition and enforcement of judgments should be an additional consideration in this regard.

C. Methodology

My research includes in-depth case studies regarding the cross-border recognition and enforcement of judgments in selected transnational corporate civil liability cases. Case study research is suited particularly for exploratory purposes and can provide analyses concerning how legislation is understood and applied.[16] Legal case study research enables the legal researcher to "see the reality with a more holistic, in-depth and contextual view, a view that is evidence-based with respect to approaches, events, behaviours and processes".[17] As such, it is the appropriate approach for research into the application in practice of the legal rules on cross-border recognition and enforcement of judgments in transnational civil litigation for corporate human rights abuse and environmental harm. In such litigation, private international law operates within a context subject to factors such as economic interests and (power) relations between states and between companies and states, requires such a holistic, in-depth and contextual view.

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[11] Dinah Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 2015).

[12] Linda J. Silberman and Franco Ferrari, *Recognition and Enforcement of Foreign Judgments* (Edward Elgar, 2017).

[13] This can be demonstrated for example by the 'Invictus Memo', prepared for a prospective third-party funder by a law firm on behalf of the plaintiffs in the Lago Agrio litigation saga (cf. *supra* note 6). Available at https://earthrights.org/wp-content/uploads/Invictus-memo.pdf.

[14] Axel Marx et al., 'Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries', Study for the European Parliament, 2019; European Parliament Committee on Legal Affairs, Draft Report with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability, 2020/2129(INL).

[15] European Law Institute, 'Business and Human Rights: Access to Justice and Effective Remedies (with input from the EU Agency for Fundamental Rights, FRA)', 2022.

[16] Lisa Webley, 'Stumbling Blocks in Empirical Legal Research: Case Study Research', *Law and Method*, 2016, https://doi.org/10.5553/REM/.000020.

[17] Aikaterini Argyrou, 'Making the Case for Case Studies in Empirical Legal Research' (2017) 13(3) Utrecht Law Review.

The case studies will rely on various data sources.[18] Data on the operation in practice of the legal rules on cross-border recognition and enforcement of judgments in the selected transnational civil liability cases will be collected through desk research, including an analysis of procedural documents, literature and media reports and NGO statements, and through semi-structured interviews with lawyers and NGOs directly involved in the case.

The case studies are chosen from three jurisdictions: the UK, where such litigation has led to many settlements, in the Netherlands, where judges have been rather receptive to these types of proceedings, and in France, where the 2017 *loi de vigilance* was the first law in Europe to adopt mandatory human rights due diligence obligations and includes a civil liability mechanism for harm caused by non-compliance.[19] As such, French litigation is an interesting 'prelude' to the EU Corporate Sustainability Due Diligence Directive (CS3D), on which the European Parliament recently agreed on its position.[20]

D. Concluding thoughts

My research focuses on cross-border enforceability of judgments – and of various types of substantive remedies – as one of the questions of and possible barriers to access to remedy for victims of corporate human rights abuse and environmental harm. Enforcement is an indispensable part of the right to access to justice, and can also facilitate the preventive effect of litigation.

The rapidly evolving landscape of legislation and litigation in the field of business and human rights requires a continuous reflection on and refinement of this research and methodology. Remaining questions regarding delineation include, for example, whether or not to include climate change litigation against companies, which raises very interesting questions regarding substantive remedies and enforcement but also regarding feasibility.

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[18] See Irene Van Oorschot I and Peter Mascini, 'Cases under Construction' in Willem H. Van Boom, Pieter Desmet and Peter Mascini (eds), Empirical Legal Research in Action (Edward Elgar Publishing, 2018).

[19] Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (available at https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626/).

[20] Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937; Amendments adopted by the European Parliament on 1 June 2023 on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM(2022)0071 – C9-0050/2022 – 2022/0051(COD)) (available at https://www.europarl.europa.eu/doceo/document/TA-9-2023-0209_EN.html).